181A

MEMORANDUM OF SETTLEMENT

B E T W E E N:

YVONNE CHORTYK

Complainant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
THE OFFICE OF THE LEGISLATIVE ASSEMBLY,
THE HONOURABLE JOHN M. TURNER, SPEAKER and
R. J. FLEMING

Respondents

WHEREAS Mrs. Yvonne Chortyk brought a complaint against the Respondents pursuant to the provisions of the Human Rights Code;

AND WHEREAS Professor M. Gorsky was appointed a Board of Inquiry under the Human Rights Code to hear and decide the above-mentioned complaint #E-7474;

The parties to the above-noted proceedings agree on the following terms and conditions of settlement of the above-noted complaint:

1. The Office of the Legislative Assembly shall pay to the complainant the sum of $11,587.00 less income tax, in lieu of compensation for the period from the date of Mrs. Chortyk's suspension on October 14, 1981 until the date of the Speaker's decision on March 23, 1982.

..../2

2. Mrs. Chortyk will execute a complete release in favour of the Respondents in a form satisfactory to the Office of the Legislative Assembly.

3. It is understood and agreed that this settlement is not to be construed as an admission of liability or of wrongdoing by the Office of the Legislative Assembly, the Director of Administration of the Office of the Legislative Assembly or any other person.

4. Mrs. Chortyk represents that during the period from October 14, 1981 up to and including March 23, 1982, she received no unemployment insurance benefits;

5. The Director of Administration of the Office of the Legislative Assembly agrees to provide a letter of reference to Mrs. Chortyk in a form suitable to the Director and to the Human Rights Commission.

6. This settlement is subject to the approval of the Human Rights Commission.

DATED at Toronto this 12TH day of April, 1982.

Yvonne Chortyk
YVONNE CHORTYK

John C. Murray
JOHN C. MURRAY
Counsel for the Respondents

WITNESS

The terms of this settlement are hereby approved by the Ontario Human Rights Commission.

ONTARIO HUMAN RIGHTS COMMISSION

Ontario

LEGISLATIVE ASSEMBLY

Director of
Administration
(416) 965-9494

Parliament Buildings
Queen's Park
Toronto, Ontario
M7A 1A2

April 14, 1983

TO WHOM IT MAY CONCERN

Mrs. Yvonne Chortyk worked for me in the capacity of Administrative Assistant from February 1977 until October 1981.

In addition to performing normal administrative duties, Mrs. Chortyk served as Administrative Co-ordinator to the Board of Internal Economy, assisting me in my capacity as Secretary to the Board. Mrs. Chortyk was responsible for contacting the Members of the Board, looking after meeting arrangements, co-ordinating the flow of documents and information, and distributing Agendas and Minutes. She also initiated and prepared an index of all Board decisions.

On occasion, Mrs. Chortyk was called upon to arrange the itinerary of special visitors to the Legislature and accompany them throughout their stay. She represented the Office of the Assembly on an all-government Committee planning for the July 1st Celebrations at Queen's Park and on many occasions looked after special public relations assignments on my behalf. She also was co-chairman of the United Way Campaign and co-ordinated Blood Donor Clinics.

Mrs. Chortyk performed these assignments in a proficient, intelligent manner and could always be counted on to enthusiastically represent the Office of the Assembly.

Yours sincerely,

Robert J. Fleming
Director of Administration

by October 13. Under these circumstances we do not believe that any argument based on the equitable doctrine of estoppel can succeed.

Accordingly, for all of the reasons given the board concludes that the employer had grounds to discipline the grievor.

Was the discipline of dismissal appropriate in these circumstances? We are of the view that it was a reasonable response. Mrs. Chortyk was aware that her employment was becoming tenuous. She had openly refused to take supervision from Mr. Mitchinson and her position has remained unchanged even to this day. The immediate office of the director is small numerically, there being four employees in total, and it therefore does not permit the continued existence of such acrimony. Under such circumstances the board concludes that the dismissal of Mrs. Chortyk was an appropriate response and we can find no mitigating circumstances warranting any lesser degree of discipline. The grievance is therefore dismissed.*

DATED at Kingston, Ontario this 23rd day of August, 1982.

C. Gordon Simmons

C. Gordon Simmons Chairman
For the Board

/lb

*On August 12, 1982, the Board's secretary notified the parties by telegram that Mrs. Chortyk's grievance was dismissed, with reasons for the decision to follow. The Board's reasons are stated above.

In the concilation part of the fact finding conference, the complainant flatly refused to ever report to the executive assistant. She feels that if the agreement signed in March 1981 had been honoured, she would still have a job. However, she feels that the respondent deliberatly reneged on the agreement as a form of reprisal to force her out of her job because of her former complaint with the Commission.

Since a complaint and formal investigation had been done for the previous Section 4 complaint, it was decided to send this case to the Commissioners for decision concerning the disposition of the case. The complainant's lawyer is questioning the credibility of the Ontario Human Rights Commission when it is possible for a respondent to sign an agreement as a result of a complaint and then not honour the agreement. In addition, the complainant's lawyer alleges the reporting relationship is implied in the agreement and the reporting relationship was changed a few months later. To her, this represents reprisal.

The concerns are as follows for deliberation by the Commissioners. Since the respondent did not live up to a WRITTEN agreement between himself and the complainant, can this be interpreted as reprisal? The complainant says yes and the respondent says no. Also is the credibility of the Ontario Human Rights Commission in question WHEN an agreement is signed as a result of a Commission complaint and then the agreement not honoured?

The complainant's lawyer alleges that a reporting relationship is implied in the agreement but the respondent alleges that the management has the right to assign duties, etc. as conditions change. To what extend is he obligated to honour the agreement? If he does not honour the agreement, is it reprisal?

It would appear to be a question of what motivated the respondent to take the actions in question and the way in which the complainant choses to interpret these actions. Only the respondent would know what motivated him and he is denying that it is reprisal. It would appear that the agreement was not honoured but can one jump to the conclusion that it is reprisal?

Attempts at Reconcilation:

The respondent was asked to consider a proposal involving reinstatement of the complainant, recovery of wages lost, recovery of out of pocket expenses including legal fees, clearing of her personnel record, and active aid from him in finding another job comparable to her present one but in the civil service rather than in the administrative assembly. The respondent denied that there had been any discrimination or any reprisal and flatly refused the proposals of reconcilation.

181-A

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE R.S.O. 1981 CHAPTER 53 AS AMENDED

AND IN THE MATTER OF a complaint made by Yvonne Chortyk of Toronto, Ontario alleging discrimination in employment and reprisal by the Office of the Legislative Assembly and Mr. R. J. Fleming.

B E T W E E N:

The Ontario Human Rights Commission, on the Complaint of Yvonne Chortyk
Complainant

- and -

Her Majesty the Queen in Right of Ontario the Office of the Legislative Assembly, and R. J. Fleming
Respondents

Board of Inquiry: M. R. Gorsky

Appearances: Allan C. Millward - and - D. D'Oliveira - Counsel for the Ontario Human Rights Commission and the Complainant, Yvonne Chortyk

John C. Murray - Counsel for the Office of the Legislative Assembly

Date of Hearing: January 26, 1983

Place of Hearing: Toronto, Ontario

INTERIM DECISION

On the 5th day of January 1983 I was appointed as a Board of Inquiry under the Ontario Human Rights Code, 1981, by the Minister of Labour, to hear and decide a complaint made by Ms. Yvonne Chortyk against Her Majesty the Queen in the Right of Ontario, and her servants and agents, the Office of the Legislative Assembly and Mr. R. J. Fleming. There were, in fact, two complaints. The first, dated August 14th, 1980, alleges that the complainant was discriminated against in employment by The Office of the Legislative Assembly and by Mr. R. J. Fleming on the basic of sex contrary to the provisions of section 4(1)(b)(c)(e)(g) of the Ontario Human Rights Code, R.S.O. 1970, cap.318, as amended. The second complaint, dated the 28th day of August, 1981, alleges that the Respondents engaged in discrimination against the Complainant in employment as a reprisal for the complainant having previously filed a complaint under the Code contrary to the provisions of sections 6(b)(c)(d) on the grounds of section 6(e)(f)(g)(h) of the Ontario Human Rights Code, R.S.O., 1980 cap. 340, as amended.

Notices of hearing to be held on January 26, 1983, were forwarded to the parties and a hearing was convened on that date.

At the commencement of that hearing, Mr. Murray, representing the Respondents, indicated that he wished to raise a number of preliminary objections.

Mr. Murray's first submission relating to the jurisdiction of this Board was that the complaint, No. E-6926, dated August 14, 1980, had been settled and that the Board had no jurisdiction to deal with it. Mr. Murray referred to section 16(1) of the Ontario Human Rights Code R.S.O. 1980 cap. 340 which provides that:

> "Where a complaint has been filed with ... the Commission, the Commission or an officer thereof shall inquire into the complaint and endeavor to effect a settlement of the matter complained of."

Section 17(1) of the 1980 Code provides:

> "Where it appears to the Commission that a complaint will not be settled, the Commission shall make a recommendation to the Minister as to whether or not a board of inquiry shall be appointed, and the Minister may, in his discretion, appoint a board of inquiry ... to hear and decide the complaint."

It was the position of Mr. Murray, on behalf of the Respondents, that a board of inquiry will have jurisdiction to hear a complaint where the complaint has not been settled and the Minister on the recommendation of the Commission, in his discretion, appoints such a board. Mr. Murray submitted that where there has been a settlement of the complaint there is no provision in the 1980 Code for the appointment of a board of inquiry and, accordingly, in case of a settlement, there would be no jurisdiction in a board of inquiry to inquire into the complaint. It was acknowledged that a memorandum of settlement had been entered into between the Office of the Legislative Assembly and the Complainant with respect to case No. E-6926,

being the complaint of August 14th, 1980, which memorandum of settlement was dated the 13th day of March 1981 (Exhibit 6), and the terms of the settlement were confirmed on April 1st, 1981 by means of letters to the Complainant (Exhibit 7) and to Mr. Fleming (Exhibit 8).

Paragraph two of the memorandum of settlement provided that:

> "...as a means toward resolving the above-cited matter, the following proposals were agreed to:
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> (2) Verbal assurance that weekly meetings will be held to review work assigned from previous week and to assign new responsibilities for the week to follow ...".

It was Mr. Murray's position that as the first complaint was the subject of a settlement, a board of inquiry only having jurisdiction to deal with allegations of contraventions of the Code, was without jurisdiction in this case. An alleged breach of the settlement agreement was not, at the time of the filing of the complaint, capable of founding a contravention of the Code. Mr. Murray referred to section 18(6) of the 1980 Code which provides:

> "Subject to appeal under section 20, the board of inquiry has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision."

Mr. Murray also referred to the provisions of section 19(a) of the 1980 Code which is as follows:

> "The board, after hearing a complaint,
>
> (a) shall decide whether or not any party has contravened this Act ..."

It was Mr. Murray's positon that the provisions quoted from sections 18 and 19 of the 1980 Code indicated that a board of inquiry only has jurisdiction to deal with allegations of non-compliance with the Code and as the allegation with respect to the breach of the memorandum of settlement did not, at the time of the filing of the complaint, amount to non-compliance with the Code, there was no jurisdiction in a board of inquiry to deal with the alleged non-compliance with the settlement.

Mr. Murray compared the provisions of the 1980 Code with those of the 1981 Code, and noted that the 1980 Code did not contain any provision concerning the power of a board of inquiry to deal with a breach of a settlement agreement and limited the board of inquiry to dealing with complaints of alleged violations of the Code. Section 42 of the 1981 Code provides:

> "Where a settlement of the complaint is agreed to in writing signed by the parties and approved by the Commission, the settlement is binding upon the parties, and a breach of the settlement is grounds for a complaint under section 31, and this Part applies to the complaint in the same manner as if the breach of the settlement were an infringement of a right under this Act."

Section 42 represents a new substantive right which makes a breach of an agreement of settlement a basis for a

complaint which could be referred to a board of inquiry for determination. The provisions of section 42 of the 1981 Code have created a new substantive provision which would not be applicable, retrospectively, to the complaints of the Complainant. Even if the provisions of section 42 were applicable in the case of the first complaint, no complaint was made pursuant to its provisions.

It was the position taken by counsel for the Commission and the Complainant that this Board must proceed to determine whether the Respondents had contravened the Code, regardless of the fact that the first complaint may have been settled; and if the Board found that it had jurisdiction to give effect to the preliminary objection of the Respondents that the Board was deprived of its jurisdiction to inquire into the first complaint by the virtue of the settlement of that complaint, it would be incumbent upon the Board to first determine whether the purported settlement was breached by the Respondents. It was the further position of counsel for the Commission and the Complainant that if it was then found that the agreement had been breached,the Board might, thereafter, proceed to inquire into the merits of the allegation set out in the first complaint. The latter argument is based on the assumption that a breach of the terms of the agreement of settlement has the effect of abrogating the settlement and of permitting the Commission to treat the matter as if no settlement had been achieved. That being the case, the Commission would be free to request appoint-

ment of a board of inquiry to deal with a complaint as if it had never been settled. Such a view is inconsistent with the provisions of section 17 of the 1980 Code (Section 35 of the 1981 Code is to the same effect) which limits the powers of the Minister to appoint a board of inquiry to cases where a settlement has not been achieved. If it was intended to achieve a result which had the effect of abrogating the settlement and returning the parties to their original position (as if no settlement had been entered into) then the Code ought to have so provided. It did not do so, and a provision which recognized the problem and permitted a complaint based on a breach of a settlement agreement was not introduced until the enactment of section 42 of the 1981 Code. This is not to suggest that the Commission and the Complainant are without a remedy for breach of the settlement agreement, however, it cannot be by means of resort to the appointment of a board of inquiry to deal with a settled complaint.

Counsel for the Commission and the Complainant submitted that "the issue before the Board of Inquiry insofar as the first Complaint is concerned is whether or not the Respondents discriminated against the Complaint (sic) and on the basis of her sex. The rights sought to be protected here is the fundamental human right of an individual to be free from discrimination on a prohibited ground and the right flows from the Ontario Human Rights Code and not from the settlement agreement. It may be that as a preliminary matter, the Board of Inquiry may determine whether there was a breach of the settlement agreement but as the

Respondents conceded at page 4 of their submissions, the Board of Inquiry has exclusive jurisdiction to determine questions necessarily answered in determining whether any person has Contravened.'" The position of Counsel for the Commission and the Complainant, immediately above referred to, does not consider the language of the relevant Code which limits the reference to a board of inquiry to cases where a settlement has not been arrived at. The relevant Codes recognize the difference between situations where a settlement has been arrived at and where the complaint remains unsettled. In recognition of the problem, the 1981 Code has provided a means of proceeding with a complaint based on an alleged breach of a settlement agreement. As to the exclusive jurisdiction of a board of inquiry, referred to by both counsel, such jurisdiction should not be exercised where a complaint was not properly before the board, assuming it was intended to refer the first (settled) complaint to this Board.

Counsel did not refer me to any cases where a complaint had been settled and the matter subsequently referred to a board of inquiry nor have I been able to find any relevant authority.

For the above reasons, my Interim Decision is that to the extent that the first complaint has been settled I do not have jurisdiction to deal with it.

Because of the conclusion that I do not have jurisdiction to deal with the first complaint, to the extent that it has been settled, it is unnecessary for me to deal with the other submissions made by Mr. Murray: that the matter is <u>res judicata</u> or, in the alternative, that issue estoppel applies to prevent the first complaint from being dealt with by me.

In arriving at my conclusion as to the effect of the settlement I took into consideration, as well:

(1) The limitations on the use of a later Act in construing an earlier Act, but concluded that if the legislature had intended before the 1981 Code became effective to permit a board of inquiry to have jurisdiction to deal with a breach of a settlement agreement or with a settled complaint, it would have adopted appropriate language for this purpose. Cf. Ontario Human Rights Code and O'Malley (Vincent) v. Simpson-Sears Limited, 82 CLLC para. 17,015 (C.A.) at p.16,620.

(2) "Settlement" is not defined in the Code. It has been interpreted (see Simpson-Sears case, supra, 82 CLLC para. 17,009 (Div. Ct.) per Southey, J. at p.16,572, as:

> " ... an agreement by the complaint, or perhaps by the Commission to take no further steps with respect to the complaint in return for some action by the employer, past or promised, to rectify or make compensation for the injury suffered, or believed to have suffered, by the complainant employee because of the alleged contravention of the Code. No doubt the extent of the efforts made by the employer to accommodate the complaining employee, both before and after the filing of a complaint, will often be of great importance in arriving at a settlement. But a settlement means only that nothing more will be heard of the alleged contravention. It does not render lawful conduct or practices that were unlawful because they contravened the Code.
>
> "The Commission must make a recommendation to the Minister as to whether or not a board of inquiry should be appointed, where it appears to the Commission that a complaint will not be settled. If the Minister, in his discretion, appoints a board, the first duty of the board, after hearing a complaint, is to decide whether or not any party has contravened the Code ..."

These comments reinforce my view that it is not a board of inquiry that can deal with a breach of a settlement agreement. It can only deal with a contravention of the Code. There is nothing in the board's authority which enables it: (1) to decide, as a preliminary matter, whether a settlement is, by virtue of an alleged breach of its terms, to be treated as no longer a settlement or (2) to adjudicate as to whether there has been a contravention of the Code where a settlement agreement has been entered into. That is, to assume that the Minister intended the board to ignore the settlement and hear the complaint in any event.

(3) Although Mr. Murray relied on the provisions of the 1980 Code as dictating when a board of inquiry might be appointed, my appointment was under the 1981 Code. The provisions for appointment of a board of inquiry are procedural and retrospective in this case. Sec. 35(1) of the 1981 Code are stated to apply only where a settlement has not been effected and I would arrive at the same conclusion under the 1981 Act. I have already dealt with the provisions of s. 42 of the 1981 Act and its significance for my decision.

(4) Even if the language of s. 35(1) of the 1981 Code was logically susceptible of the interpretation suggested by Commission counsel, I would find that "the construction of the words in their ordinary and natural meaning", is more consistent with an interpretation in which a board of inquiry does not have jurisdiction to deal with a case of a settled complaint.